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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/775,896	02/10/2004	David M. Allen	2646-000003	1397
27572	7590	06/26/2006		
HARNESSE, DICKEY & PIERCE, P.L.C. P.O. BOX 828 BLOOMFIELD HILLS, MI 48303			EXAMINER GELLNER, JEFFREY L	
			ART UNIT	PAPER NUMBER
			3643	

DATE MAILED: 06/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/775,896

Applicant(s)

ALLEN, DAVID M.

Examiner

Jeffrey L. Gellner

Art Unit

3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 05 April 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-7, 10-12 and 15-21 is/are pending in the application.
- 4a) Of the above claim(s) 4, 5 and 19 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3, 6, 7, 10-12, 15-18, 20, 21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 6, 10, 11, 16-18, 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gearing et al. (WO 03/096791 A1) in view of Due et al. (US 5,809,690).

As to claims 1 and 20, Gearing et al. disclose a mulch shield (Fig. 8) for surrounding a trunk or stem of a plant, the mulch shield comprising a body having a bendable wall member (Figs. 4 and 8); a lower flange coupled to the body and extending therefrom in a radially outward direction (6 of Fig. 8); and a closure means (21 of Fig. 8); wherein a slit is formed through the wall member and the lower flange that permits the body to be positioned in a first, generally C-shaped condition (implied from Figs. 4 and 8), that is adapted to permit the mulch shield to be placed about the trunk or stem of the plant, and a second condition in which the wall member encircles the trunk or stem of the plant (Fig. 8); and, wherein the closure means is operable for maintaining the body in the second condition (Fig. 8), the body capable of coiling about the tree trunk (from page 7, 5<sup>th</sup> para. in that the body is made of "polythene" which is considered to be resilient). Not disclosed is an upper flange with the slit extending therethrough. Due et al., however, disclose a shield with an upper flange (35 of Figs. 5 and 6, especially Fig. 6). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the

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shield of Gearing et al. by adding upper flanges as disclosed by Due et al. so as to allow the shield to be supported by a trellis wire (see Due et al. at col. 3 lines 1-3). The shield of Gearing et al. inherently performs the method steps that are recited in claim 20 when used.

As to claims 2, 3, and 6, Gearing et al. as modified by Due et al. further disclose the closure means including a resilient characteristic of the body ("tab" 21 of Fig. 8 of Gearing et al. is considered resilient in that it stays in the aperture) and a tab and aperture (21 of Fig. 8 of Gearing et al.).

As to claim 10, Gearing et al. as modified by Due et al. further disclose the upper flange spaced apart by a predetermined distance that is a desired thickness (Fig. 6 of Gearing et al.).

As to claim 11, the limitations of claim 10 are disclosed and described above. Gearing et al. as modified by Due et al. further disclose the thickness being 12 inches (.3 m of page 14). Not disclosed is the thickness being 3-5 inches. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Gearing et al. as modified by Due et al. by making the thickness of the mulch 3 to 5 inches and the shield 3 to 5 inches to accommodate the mulch.

As to claim 16, Gearing et al. as modified by Due et al. further disclose a non-porous material ("MYLAR" of last para. on page 7 of Gearing et al.).

As to claims 17, Gearing et al. as modified by Due et al. further disclose a living hinge (shown in Figs. 4 and 8 of Gearing et al.).

As to claims 18, Gearing et al. further disclose a generally parallel slit (implied by Figs. 4 and 8 of Gearing et al.).

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Claims 7 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gearing et al. (WO 03/096791 A1) in view of Due et al. (US 5,809,690) in further view of Reed (US 6,067,747).

As to claim 7, the limitations of claim 7 are disclosed and described above. Not disclosed is a plurality of cleats formed on the lower surface of the lower flange. Reed., however, discloses a shield with a plurality of cleats on the lower surface of a lower flange (4 of Fig. 1). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the shield of Gearing et al. by adding a plurality of cleats on the lower surface of the lower flange as disclosed by Reed so as to ensure the shield is firmly placed in the ground (Reed at col. 2 lines 46-55).

As to claim 21, Gearing et al. disclose a mulch shield (Fig. 8) for surrounding a trunk or stem of a plant, the mulch shield comprising a body having a bendable wall member (Figs. 4 and 8); a lower flange coupled to the body and extending therefrom in a radially outward direction (6 of Fig. 8); and a closure means (21 of Fig. 8); wherein a slit is formed through the wall member and the lower flange that permits the body to be positioned in a first, generally C-shaped condition (implied from Figs. 4 and 8), that is adapted to permit the mulch shield to be placed about the trunk or stem of the plant, and a second condition in which the wall member encircles the trunk or stem of the plant (Fig. 8); and, wherein the closure means is operable for maintaining the body in the second condition (Fig. 8). Not disclosed is an upper flange and a plurality of cleats formed on the lower surface of the lower flange. Due et al., however, disclose a shield with an upper flange (35 of Figs. 5 and 6, especially Fig. 6); Reed discloses a shield with a plurality of cleats on the lower surface of a lower flange (4 of Fig. 1). It would have been

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obvious to one of ordinary skill in the art at the time of the invention to modify the shield of Gearing et al. by adding upper flanges as disclosed by Due et al. so as to allow the shield to be supported by a trellis wire (see Due et al. at col. 3 lines 1-3) and to modify the shield of Gearing et al. by adding a plurality of cleats on the lower surface of the lower flange as disclosed by Reed so as to ensure the shield is firmly placed in the ground (Reed at col. 2 lines 46-55)..

Claims 12 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gearing et al. (WO 03/096791 A1) in view of Due et al. (US 5,809,690) in further view of Koffler et al. (US 4,829,707).

As to claim 12, the limitations of claim 1 are disclosed and described above. Not disclosed is at least one second body configured to be received into the body and telescopically moved with respect to the body. Koffler et al. discloses a second body (20 of Figs. 4 and 5) that is configured to be received into a body of a shield (see Fig. 5) and can telescopically move. It would have been obvious to one of ordinary skill in the art at the time of the invention to further modify the shield of Gearing et al. as modified by Due et al. by adding a second body as disclosed by Koffler et al. so as to have an insulating layer to keep plants warm on cold nights (see Koffler et al. col. 4 lines 1-14).

As to claim 15, Gearing et al. as modified by Due et al. and Koffler et al. further disclose a retaining means for the second body (tight fit that is shown in Fig. 5 is a retaining means).

### ***Response to Arguments***

Applicant's arguments filed 5 April 2006 have been fully considered but they are not persuasive. The crux of Applicant's arguments are: (1) neither Gearing et al. nor Due et al. disclose or suggest a bendable wall portion for coiling about a trunk of a tree (Remarks throughout page 9); (2) neither Gearing et al. nor Due et al. disclose or suggest a closure means that including a resilient characteristic (Remarks page 9, bottom.); and (3) Gubin et al. does not disclose cleats (Remarks page 11, top half).

As to argument (1), Examiner considers Due et al. to disclose a body which is capable of coiling around the trunk or stem of a plant. Therefore, the art discloses the claimed invention.

As to argument (2), Examiner considers the closure means of Gearing et al. to be resilient because it can be reused for closing.

As to argument (3), Examiner has used an new reference which discloses "cleats."

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Wilson and Fujimoto disclose in the prior art various shields with cleats.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey L. Gellner whose telephone number is 571.272.6887. The examiner can normally be reached on Monday-Friday, 8:30-4:00, alternate Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on 571.272.6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

A handwritten signature in black ink, appearing to read 'J. Gellner', with a stylized flourish at the end.

Jeffrey L. Gellner  
Primary Examiner  
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